United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,363

AFRO-AMERICAN PUBLISHING COMPANY, INC.,

Appellant,

v.

ELI JAFFE, t/a THE DOUGLAS PHARMACY,

Appellee

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APPELLEE'S PETITION FOR A REHEARING *EN BANC*

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Comes now the Appellee in the above-entitled cause and respectfully prays the Court to grant a rehearing of this appeal *en banc*. As grounds for the Petition, Appellee states to the Court as follows:

A three-judge panel of this Court heard argument on this appeal on Thursday, September 10, 1964, and rendered its decision on May 27, 1965, *per curiam*, reversing the decision of the District Court and remanding the case for judgment in appellant's favor. Judge Washington dissented.

The questions involved in this appeal are (1) whether the cancellation of a newspaper subscription by a neighborhood druggist because of his personal opinion that the newspaper was spreading racial hatred and distrust is a matter of legitimate public interest, and (2) whether a private individual's act of cancelling a newspaper subscription places him in an area of public debate so as to defeat his right to privacy.

The pertinent facts are as follows: In October 1961, appellee (hereinafter referred to as "Jaffe"), the proprietor of a small neighborhood drug store, called appellant's (hereinafter referred to as Afro) business office and was connected with the Circulation Department. He stated to the woman who answered that he wished to cancel his subscription to the Afro, whereupon he was immediately referred to Mr. Stone, the editor of Afro. Jaffe had not asked to speak with the editor. Mr. Stone asked Jaffe why he wanted to cancel and he answered, "I just want to cancel it. I don't have to give you a reason." (J.A. 46) Mr. Stone then asked Jaffe if he could come to his store and talk with him about the matter and Jaffe said, "You don't have to * * * I just don't want to take the paper." (J.A. 46) About a week later Mr. Stone went to Jaffe's store to talk with him about the matter and in the course of the conversation Jaffe was asked again why he wanted to cancel. Jaffe said he thought the paper was spreading racial hatred and distrust and he didn't like the fact that the Afro had carried an ad about the Communist Party. Mr. Stone testified that he became angry and walked out.

A few days later the Afro published a picture of Jaffe's drug store on its first page with the caption "The picture below is the scene of 'ONE MAN'S WAR AGAINST THE AFRO'." There was also a lengthy accompanying article stating that the white Jewish proprietor of said drug store cancelled his subscription to said newspaper because he felt the newspaper was spreading racial hatred and this would make him "appear to be a bigot," that the proprietor operates his drug store in a neighborhood where "he like a good many white people refuses to live,"

that he is "attempting to tell colored people just how fast and hard they should run in their race toward racial equality," and that if he has the right to refuse to sell the Afro in his store "then every colored man, woman, and child who lives anywhere near 15th St. S.E. and Independence Ave., has a comparable right not to buy a single article in his store."

Prior to the cancellation Jaffe received 60 papers per week on consignment, sold an average of 30 and returned the unsold papers. At the time Jaffe cancelled his subscription to Afro, the newspaper was being sold in 76 retail establishments within a 15-block radius, and at a store just one block from Jaffe's store. (Plaintiff's Exhibit 5, J.A. 62)

Both Judge Bazelon and Judge Wright were of the opinion that the subject of the article was a matter of public concern and, therefore, came under the protection of the fair comment rule. Judge Washington was of the opposite opinion.

Jaffe contends that the subject is merely a small druggist "canceling his subscription to a newspaper," whereas Mr. Stone, the author of the article, claims that the "subject of that article is the total relationship of whites and Negroes in America." Judge Bazelon concurred with Mr. Stone's idea on the theory that the existence of a public interest question depends "upon the facts as they reasonably appear to the person whose liability is in question." Both Judge Wright and Judge Washington disagreed with Judge Bazelon's statement of the law, which does appear to be contrary to all reported decisions. The publisher of the alleged defamation is not the one who decides whether the subject matter of an article is of public concern — that is a matter to be determined by the trier of the facts. This problem was present in the landmark case of *Bailey v. Holland*, 7 App. D.C. 184 (1895), and the Court said at p. 191:

> What defendant may have considered his duty does not render his letter any the less of a libel. He must be

> presumed [from all the facts as a whole] to have intended an injury to the plaintiff. (Emphasis added.)

See also *Hogan v. New York Times Co.*, 313 F.2d 354 (2d Cir., 1963).

The trial judge in the instant case concluded from all the facts that the publication was not privileged. His conclusion, it is urged, should not be reversed unless it is clearly erroneous.

The law pertaining to the defense of fair comment is stated in 33 Am.Jur., *Libel and Slander*, § 163:

> Cases in which the right to fair comment exists may be broadly divided into two groups: (1) those involving matters that are inherently of interest to the public, as, for example, the administration of government and of public justice, the management of public institutions, and the conduct of public servants; and (2) those involving matters that are of interest to the public because individuals have voluntarily given up their right of privacy and have submitted themselves, their acts, or their accomplishments to the public scrutiny. * * *

Prosser states that:

> [the defense of fair comment] is limited to those matters which are of **legitimate** concern to the community as a whole because they **materially affect the interest of all the community.** Prosser, *Torts* 812 (3rd ed. 1964) (Emphasis added.)

Matters that have been held to materially affect the general interest of the whole community are distribution of food, the pollution of water supply, and quack medical service, to name a few. Prosser, *Ibid.*

Judge Bazelon was of the opinion that Jaffe should not recover in this case because he had not proved special damages — despite the fact that the publication in the instant case was held to be libelous *per se*. This holding by Judge Bazelon would have the effect of reversing a long

line of decisions of this Court. Judge Bazelon has interpreted *Sweeney v. Patterson*, 76 U.S. App. D.C. 23, 128 F.2d 457, *cert. denied*, 317 U.S. 678 (1942), as authority for requiring that Jaffe must prove special damages in order to recover. It is respectfully contended that *Sweeney* did not go so far. The *Sweeney* case, unlike the instant case, involved a public official, a Congressman. Under such circumstances the alleged defamatory material was held not to be libelous *per se*, and therefore damages had to be proved before he could recover. The publication in the instant case was found to be libelous *per se*, and it has long been settled in this jurisdiction that where a publication is libelous *per se*, the action is maintainable and plaintiff is entitled to recover without proof of special damages. *Norfolk and Washington Steamboat Co. v. Davis*, 12 App. D.C. 306 (1898); *Washington Times Co. v. Downey*, 26 App. D.C. 258 (1905); *Thackrey v. Patterson*, 81 U.S. App. D.C. 292, 157 F.2d 614 (1946); *Curtis Publishing Co. v. Vaughan*, 107 U.S. App. D.C. 343, 278 F.2d 23 (1960), *cert. denied*, 364 U.S. 822.

It is urged that the cancellation of a newspaper subscription is not a matter which materially affects the whole community nor a matter in which the public has any legitimate interest or concern. Assuming *arguendo* that Jaffe's personal views regarding Afro could be interpreted as a matter of public interest, it is contended that any interest the public may have in those views is not sufficient to overcome Jaffe's right to be free of the vicious attacks this article made on his personal character.

This Court held in *DeSavitsch v. Patterson*, 81 U.S. App. D.C. 358, 159 F.2d 15 (1946), that the privilege of fair comment is lost if the publication reaches beyond the bounds of fair comment and maligns the personal character of an individual. That case involved a newspaper story about plaintiff's appointment to the permanent staff of Glenn Dale Sanitarium. This Court was of the opinion that the article was libelous *per se* because it suggested that the plaintiff was a foreign born impos-

tor attempting to push himself through political assistance and personal charm, while suffering an absence of professional competency. Defendant contended that it was fair comment on the official reports from which they got their information. The Court conceded that information in matters of public health is of great public interest, but said at p. 359:

> The privilege which extends to the Press in these matters of public interest in information is but one side of an equation which constantly appears before the courts. **The other side, and one not to be forgotten nor lightly disposed of, is the right of the individual not to be wantonly maligned or injured by publications.** (Emphasis added.)

This Court has also held that the defense of fair comment is not applicable just because the story might be interesting to read. *Washington Herald v. Berry*, 41 U.S. App. D.C. 322 (1914), involved a man who, while employed in the Weather Bureau, had made public charges of misconduct about his boss, the Chief of the Bureau, and had even sought and received newspaper publicity concerning said charges. Sometime later the plaintiff resigned and in his letter of resignation to the Secretary of Agriculture mentioned the Bureau Chief's misconduct. Defendant newspaper published a story about plaintiff's resignation which carried the implication that he was a fanatic and was dismissed from his job. The defense was that because of plaintiff's past actions in seeking publicity about his controversy with his boss, the circumstances of his leaving office was a matter of public interest. The Court rejected the defense of fair comment, saying:

> The plaintiff was a private person who had resigned from public office, and **while the article relating to him may have made a good story in the views of the publishers of the Herald, it was not a privileged one.** A newspaper has no peculiar privilege in such matters. *Ibid*, at p. 337. (Emphasis added.)

In the *Berry* and *DeSavitsch* cases this Court upheld the fundamental right of a private individual not to be wantonly maligned or injured by publications. In view of these two decisions, it is inconceivable that Jaffe's individual rights were not similarly protected. As a retailer he had the right to sell whatever brands of tooth paste, ice cream, or razor blades he desired. He had the same right to sell whatever newspapers he wanted to or, for that matter, not to sell any newspapers if he did not want to. It is respectfully suggested that the decision in the instant case is a drastic departure from the reasoning and principles involved in *Berry* and *DeSavitsch*.

Judge Wright, in addition to holding that a matter of public interest was involved herein, was of the opinion that "appellee intruded himself into an area of public debate by attempting to censor the newspaper with respect to the publication of its views on Negro rights," and "thereby jeopardized his right to privacy." All the cases he cited involved criticism or comment on **public officials** in their capacity as such, *Sweeney v. Patterson, supra; New York Times v. Sullivan*, 376 U.S. 254 (1964); *Ashford v. Evening Star Newspaper Co.*, 41 App. D.C. 395 (1914), or cases where the plaintiff, by his acts or accomplishments, **voluntarily** involved himself in a matter or controversy which was of interest to the public at large, *Sullivan v. Meyer*, 66 App. D.C. 280, 86 F.2d 836 (1936) (spokesman for citizens federation who formally and publicly protested to the Board of Education — a public institution — against the use of certain textbooks in the public schools); *Pauling v. News Syndicate Co.*, 335 F.2d 659 (1964) (famous biochemist and Nobel Prize winner who had for many years publicly protested against the use of nuclear weapons and continuing nuclear tests and who had written letters to both President Kennedy and Premier Kruschev about same).

In all of these cases the plaintiff indeed had **deliberately** and **voluntarily** put his opinions and views in the public area of debate on vital public issues, and in such instances the press certainly has a right and

a duty to comment fairly regarding them. It should be noted that in the *Pauling* case the Court intimated that this was a case where the defense of fair comment might have been rejected on the ground that the publication went beyond the bounds of fair comment — despite the fact that Pauling was a world-renowned expert on nuclear weapons and the entire world has a legitimate interest in the use of such weapons!

It is far-fetched to say that by cancelling his subscription Jaffe "intruded himself into an area of public debate." In the first place, Jaffe is not a public figure such as were the plaintiffs in the cases cited by Judge Wright. His views and opinions on anything, much less on whether he liked the Afro or not, could be of no legitimate interest to the public. A private individual's opinion about a newspaper cannot be equated to a Pauling's views on nuclear testing. At the time he cancelled, Jaffe even refused to give his reasons. His opinion of the Afro would not have been made known even to Mr. Stone, the editor, had he not persisted in going to Jaffe's store a week after the cancellation and demanded to know Jaffe's reason for cancelling. Only then did Jaffe divulge his opinion of the Afro. It was a **personal** opinion given by a **private** individual in the course of a **private** conversation **which was not even initiated by him.** The public never would have been aware of Jaffe's opinion of Afro if Afro itself had not publicized same. **If there was any public debate involved, it was Afro and not Jaffe who created it.** It should also be emphasized that when Mr. Stone, according to his own testimony, told Jaffe that he was going to conduct a poll of the neighborhood to ascertain what the people thought of the Afro, Jaffe told him he could do what he wanted but to leave him out of it.

Moreover, the cancellation could not possibly have the effect of a "censor." The people in the neighborhood were not deprived of the opportunity to buy Afro. A store just one block away sold it, as did numerous places within a couple of blocks of Jaffe's store. In fact, it was being sold in no less than 76 retail establishments within a 15-block radius of his store.

Both Judge Bazelon and Judge Wright seemed to be of the view that Jaffe could not recover without proof of malice, and as authority cited the *New York Times* case, *supra*. However, the *New York Times* case merely held that damages for libel in actions brought by public officials against critics of their official conduct cannot be awarded without proof of malice. It is noteworthy that the rule announced in *New York Times* has never been applied in cases of private individuals — even individuals who, unlike Jaffe, are celebrities and in the public eye. The *New York Times* rule was specifically rejected in *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529 (1964), which dealt with invasion of privacy when defendant published a biography of Spahn, a major league pitcher, which contained reports of his personal relationships with members of his immediate family and his introspective thoughts, and in *Dempsey v. Time, Inc.*, 252 N.Y.S.2d 186 (1964), wherein the former heavyweight boxing champion sued on a publication that suggested his gloves were "loaded" when he won his championship title. The court held there was no privilege even though the plaintiff was a public individual. The Court said at p. 189:

> Malice is presumed unless a qualified privilege is established, in which case actual malice must ultimately be proved. Not only has defendant not shown that this is a proper case where the doctrine of qualified privilege may be invoked, but even if it were, a reckless disregard for the truty may be shown to overcome privilege even under the New York Times doctrine.

In the instant case even if the Court were of the opinion that privilege attached, it is contended that such privilege was lost on the ground that Afro went beyond its protective shield. This Court in *Blake v. Trainer*, 79 U.S. App. D.C. 360, 188 F.2d 10 (1944), held that the defense of fair comment is inapplicable if the publication is made for an improper purpose, such as retaliation against the plaintiff.

It is contended that Mr. Stone's purpose in writing the article was not to inform his readers of the "total relationship of whites and Negroes in America." After all, he could have done that without showing a picture of Jaffe's store, or saying he was racially prejudiced and a bigot, or urging a boycott of his store. The record is fraught with testimony by Mr. Stone himself which indicates his real purpose in writing the article was to retaliate against Jaffe for cancelling his subscription and to intimidate and coerce him into taking back the paper. For instance:

> Well, he said he wanted to cancel. I knew that he was selling about 30 papers on Tuesdays and 30 papers on Fridays, that's 60 papers. We are a small paper; 24,000 that is not a lot, so 60 papers to me is significant. (J.A. 46)

When asked if he had any personal animosity or malice toward Jaffe he answered:

> Not at all. The only thing I was concerned about was getting our paper back in his store. (J.A. 48)

When asked if he had the responsibility for the circulation of Afro, he answered, "If the circulation would drop, I would be fired." (J.A. 49)

When asked what made this a matter of public interest, he said:

> I think what made it a matter of public interest was the number of papers that were being sold — this is the public in his store. I think what he decides to do in relation to a Negro paper, the largest Negro paper in the City, a city which has a majority of Negroes, in his neighborhood which is populated by 90 per cent Negroes, the confluence of these matters makes it a matter of public interest. (J.A. 49)

When asked whether he intended to hurt Jaffe by the publication, he said:

> All I wanted to do was to resolve the issue, and I hoped he would be willing to take the paper back. All I was interested in was getting the paper back in his store. (J.A. 50-51)

Stone testified that he had gotten a lot of praise from Negroes about the article because "They felt that the cause for which I was fighting was just." When asked what "cause" he was fighting, he said:

> Fighting for the survival of the paper. If people start cancelling the paper because they don't like the headlines, the aggrandize of this process could conceivably destroy the paper. (J.A. 51)

It is apparent that the article was a malicious act of retaliation and a deliberate attempt to intimidate and coerce Jaffe into taking the paper back. The press is an extremely powerful medium and should not be permitted to be used as a sledge hammer against private individuals who have no recourse but to the courts. For this reason the courts have always been strict in their requirements that the press not deviate from the sphere of fair comment. For the same reason the courts have conscienciously protected the basic rights of a private individual to be free of oppression by the press. Countless individuals everyday cancel subscriptions to newspapers, magazines, and newsletters because they do not like or agree with their editorial policies. Jaffe had the same right not to sell any newspaper he did not want to sell. **The fact that the news paper he didn't want to sell in this instance happened to be the largest Negro newspaper in the city should make no more difference than if it had been the Evening Star he cancelled.** The act of cancelling a Negro newspaper does not *ipso facto* make the transaction a matter of public interest. No newspaper should be permitted to smear an individual just because that individual doesn't like the newspaper and refuses to sell it.

There is no reported decision where anyone has been libeled as Jaffe was in this case just because he canceled his subscription. No decision of this Court or any other court has ever gone to such unjust, unfair, and dangerous extremes as the majority did in this case.

CONCLUSION

Because of the grave and far-reaching importance involved in the right of fair comment by the press as opposed to the inalienable rights of a private individual, it is respectfully submitted that a rehearing *en banc* should be granted to determine in this jurisdiction the proper application of the fair comment rule and to what extent, if any, it is affected by the recent Supreme Court case of *New York Times v. Sullivan.*

Respectfully submitted,

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Attorney for Appellee

CERTIFICATE OF COUNSEL

I, Joyce Capps, attorney for the appellee herein, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

_____
Joyce Capps

June 7, 1965

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Petition for a Rehearing En Banc was mailed, postage prepaid, this day of June, 1965, to George E. C. Hayes, Esquire, 613 F Street, N. W., Washington, D. C.

_____
Joyce Capps